FOR ARGUMENT

Supreme Court, U. S.
FILED
NOV 2 1977
MICHAEL RODAK, JR., CLERK

No. 76-709

In the Supreme Court of the United States

OCTOBER TERM, 1977

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-709

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

---

1. Respondent contends (Br. 23, 42-49) that giving federal officials absolute immunity from a suit for damages alleging a violation of constitutional rights would be inconsistent with *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, which held that there is a cause of action for damages based upon an alleged violation of the plaintiff's Fourth Amendment rights committed by a federal officer acting under color of his authority. There is no inconsistency.

a. This Court did not decide anything in *Bivens* with respect to the scope of the immunity of an officer sued for damages under the Fourth Amendment. The complaint in *Bivens* was based upon the defendant's alleged violation of that amendment. The district court dismissed the complaint on two grounds: that it "failed to state a cause of action," and that "in any event respondents were immune

from liability by virtue of their official position" (403 U.S. at 390, 397). The court of appeals affirmed solely on the ground that a violation of the Fourth Amendment did not give rise to a cause of action. This Court reversed, stating (403 U.S. at 389) that it was resolving the question "reserved" in *Bell* v. *Hood*, 327 U.S. 678, "whether violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does" (403 U.S. at 389).

Bivens argued in this Court not only the Fourth Amendment issue but also that the district court had erred in holding that the defendants were immune from suit because the acts upon which the complaint was based were done in the performance of their official duties (Brief for the Petitioner, No. 301, October Term, 1970, pp. 2, 16-24). The Court, however, expressly declined to decide the latter question, as the government had urged it to do (Brief for the Respondents, pp. 43-44), because "[t]his question was not passed upon by the Court of Appeals" (403 U.S. at 397-398).

In *Bivens* the Court thus followed its traditional practice of not deciding major questions that are unnecessary to its decision and that the lower courts have not decided. All the Court decided in *Bivens*—and all it had to decide to reverse the judgment of the court of appeals—was that the plaintiff had stated a cause of action based upon the defendants' alleged violation of his Fourth Amendment rights. It did not decide, but left it for the court of appeals to decide, whether that cause of action might fail because the defendants could assert immunity. There is no inconsistency between recognizing a cause of action but holding that certain persons have a defense to it.

Thus, even assuming *arguendo* that the holding in *Bivens* that a cause of action exists for violations of the Fourth Amendment also covers the different "constitutional torts" asserted in this case,[1] that decision would in no way be inconsistent with the ruling that the petitioners here have absolute immunity.

b. On remand in *Bivens*, the court of appeals decided that the defendants in that case did not have absolute but only qualified immunity, *i.e.*, that they could prevail by proving that they acted in good faith with a reasonable belief in the validity of their actions. 456 F. 2d 1339, 1341 (C.A. 2). Respondent argues that this ruling also establishes that petitioners here have only qualified and not absolute immunity. This argument is unsound.

i. The principal basis for the court of appeals' decision in *Bivens* was that the defendants there were nonsupervisory "federal police officers," agents of the Federal Bureau of Narcotics, who were being sued for an allegedly illegal search and arrest (456 F. 2d at 1341-1342). Relying upon *Pierson* v. *Ray*, 386 U.S. 547, 555, the court of appeals in *Bivens* recognized and adhered to the proposition that " '[t]he common law has never granted police officers an absolute and unqualified immunity * * *' " (456 F. 2d at 1346). Reasoning that this traditional rule "is equally

---

[1]The complaint in this case alleges a violation not of the Fourth Amendment, but of the First and Fifth Amendments. The court below did not determine the legal sufficiency of these claims. Petitioners may move to dismiss for failure to state a claim upon which relief can be granted. See Rules 12(b)(6) and 12(h)(2), Fed. R. Civ. P.; cf. *Bell* v. *Hood*, 327 U.S. 678. The question whether alleged violations of the First or Fifth Amendment creates a cause of action for damages has not been definitively decided. See *Greenya* v. *George Washington University*, 512 F. 2d 556, 562-563 n. 13 (C.A. D.C.). But see *Dellums* v. *Powell*, C.A. D.C., No. 75-1974, decided August 4, 1977.

applicable to federal police officers" (456 F. 2d at 1346), the court of appeals held that such officers, "while in the act of pursuing alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights" (456 F. 2d at 1341).[2]

In so holding, the court of appeals recognized that "[i]t has long been the rule in this country that certain officers of the federal government, acting in their official capacities, are absolutely immune from lawsuits" (456 F. 2d at 1342). Under this rule the court stated that it had "two issues to resolve * * * (1) * * * is there a showing that the Narcotics Agents were acting 'within the outer perimeter of [their] line of duty'; and, if so, (2) were they alleged to be performing the type of 'discretionary' function that entitles them to immunity from suit" (456 F. 2d at 1343). Applying these criteria the court found that the agents were performing their official duties, but concluded that the actions for which the officers were sued—conducting a search and making an arrest—are "not deemed to be * * * discretionary function[s]" (456 F. 2d at 1346).[3]

---

[2]Read in context, the court's reference to "no immunity" meant no *absolute* immunity. As noted in the text, the court of appeals also held in *Bivens* that defendants could prevail by proving that they acted in good faith and with a reasonable belief that their actions were lawful (456 F. 2d at 1347-1348). The court characterized these as elements of an affirmative defense. Subsequently, in *Scheuer* v. *Rhodes*, 416 U.S. 232, this Court characterized this defense as a "qualified immunity." Cf. *Pierson* v. *Ray*, *supra*.

[3]Relying on an earlier Second Circuit opinion (*Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 659, certiorari denied, 374 U.S. 827), the court of appeals in *Bivens* stated that the question whether an act is "discretionary" is really a question whether " 'the act complained of [is] the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability' " (456 F. 2d at 1345-1346). The court explained (*ibid.*) that

> [w]hereas it is true that a police officer must exercise some discretion in making an arrest, the fiction that this act is not discretionary is maintained because of the belief that the benefit to society derived from the protection of personal liberties outweighs the detriment of perhaps deterring vigorous police action.

In short, the court of appeals in *Bivens* did not reject the rule of absolute immunity established in cases such as *Barr* v. *Matteo*, 360 U.S. 564, but decided simply that, under established criteria, the rule of absolute immunity did not apply. In contrast, as we have explained at length in our opening brief (pp. 41-59), the traditional rule of absolute immunity is fully applicable to petitioners in this case. The record shows that all of petitioners' actions were taken as part of their official duties, and that they either involved the exercise of significant discretion or were taken at the behest of superior officials who would have been absolutely immune if they personally had taken the actions.[4]

ii. As a subsidiary, alternative ground for its decision, the court of appeals in *Bivens* stated that federal officials sued for constitutional torts should have the same im-

---

[4]Respondent contends (Br. 27-28) that the affidavits upon which petitioners rely for this argument (A. 141-149) did not accompany petitioners' motion to dismiss and were not before the district court when it decided the motion. As we explained (Br. 8), however, these affidavits had been submitted in support of defendants' opposition to one of plaintiff's earlier motions for an injunction, and were part of the record when the motion to dismiss was filed. Petitioners' notice of motion to dismiss the complaint (A. 163) stated that the motion was based, "upon all prior proceedings and papers filed herein." Those prior proceedings included the application for an injunction, and those papers included the affidavits. The affidavits provided an adequate factual base for the district court's allowance of absolute immunity in this case.

munity as state officials sued under 42 U.S.C. 1983 (456 F. 2d at 1347). As we have explained in our opening brief (pp. 35-41; see pp. 57-59), however, neither this Court's decisions, nor logic, nor sound public policy requires that these two categories of government officials have the same immunity.

The immunity of state officials sued under 42 U.S.C. 1983 must be determined in light of the facts that Congress enacted that provision to make state officials answerable in federal court for violations of constitutional rights, and that the grant of absolute immunity to such officials would defeat that purpose (see our opening brief, pp. 35-41). But in cases such as this, where the causes of action are nonstatutory, there is no problem that absolute immunity might be inconsistent with and thwart legislative intent. The basic rationale of *Barr* v. *Matteo*, *supra*, 360 U.S. at 573—that absolute immunity for federal officials is necessary "to aid in the effective functioning of government"—can be given full force. Absent a contrary indication from Congress, that basic rationale should be reaffirmed and applied to petitioners in this case.[5]

---

[5]Respondent argues (Br. 50-51) that holding federal officials liable is a means of finding a " 'conduit' " to the public treasury, because "an officer who is found liable under the law is ordinarily indemnified by the treasury * * *." But unless there is authorizing legislation, this assertion is incorrect. In general, federal agencies have no authority to indemnify officials for damage awards arising out of their official duties, and a private bill would be necessary to have Congress indemnify the officer.

The Attorney General of the United States recently has proposed legislation that would expand the basis upon which the United States can be held liable under the Tort Claims Act for the conduct of its employees. See H.R. 9219, 95th Cong., 1st Sess. (1977); S. 2117, 95th Cong., 1st Sess. (1977). The proposal, *inter alia*, would make the United States suable "where the claim sounding in tort for money damages arises under the Constitution * * *" (Section 2 of H.R. 9219, *supra*), and would make this remedy against the United States "exclusive of any other civil action or proceeding * * * against the employee * * *" (Section 5 of H.R. 9219, *supra*). In a letter to The Speaker of the House, dated September 16, 1977, the Attorney General explained that "one of the main purposes of the [exclusivity provision] is to improve employee morale and foster good faith [and] vigorous performance of duty, unimpaired by the threat of personal involvement in a lawsuit."

2. Two recent court of appeals' decisions rendered after the filing of our opening brief have held that federal officers have absolute immunity for discretionary action taken as part of their official duties. Their reasoning is equally applicable to the present case.

a. In *Huntington Towers, Ltd., et al.* v. *Franklin National Bank, et al.*, C.A. 2, No. 76-6109, decided July 19, 1977, petition for a writ of certiorari filed, October 17, 1977 (No. 77-564), the Second Circuit held that the Comptroller of the Currency has absolute immunity in a suit against him for damages for his failure to declare a bank insolvent. Citing *Barr* v. *Matteo*, the court followed the "well settled" rule "that federal officials are not personally liable for alleged torts based upon acts committed within the scope of their official duties requiring the exercise of judgment or discretion * * *" (slip op. 4789). The court apparently limited its decision in the present case, when it stated that "*Economou* * * * does not purport conclusively to bar the availability of absolute immunity," "[b]ut * * * contemplates examination of the discretionary function performed by the individual official * * *" (slip op. 4789, n. 2). The court held that "the breadth and character of the discretion exercised by the Comptroller * * * makes this a clear case calling for granting absolute immunity" (*ibid.*).

b. In *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution, et al.*, C.A. D.C., No. 74-1899, decided September 16, 1977, the District of Columbia Circuit, sitting *en banc*, reaffirmed that a government official acting within the scope of his duty has absolute immunity when sued for libel. The court stated that "[t]he federal common law rule of absolute immunity * * * furthers the goal of effective administration of government in the public interest. A qualified immunity would be dependent upon a myriad of factors and a particularistic assessment of the facts of each case, leaving an official at hazard to anticipate whether or not he is protected" (slip op. 4-5; footnotes omitted).

Although *Expeditions Unlimited* involved a libel claim, the court's reasoning, like that of this Court in *Barr* (see our opening brief, pp. 21-22), is applicable beyond that limited area. The District of Columbia Circuit explicitly "disagree[d]" with *Economou* and "view[ed] it * * * as illustrating the dangers of a doctrine providing only qualified immunity" (slip op. 6). The "rejection of *Barr*," the court said, "can only exacerbate an already serious problem of modern government—the tendency of bureaucrats to sit tight rather than take action likely to rile the individuals or groups being regulated" (*ibid.*).[6] "For every case of malicious governmental action potentially remedied by

[6]The District of Columbia Circuit also disagreed with the Second Circuit's conclusion "that *Barr* had been undermined by the Supreme Court's decisions in cases arising under 42 U.S.C. 1983" (slip op. 7-9).

The court in *Expeditions Unlimitea*, however, did distinguish between suits at common law and those alleging deprivation of "fundamental, constitutional rights" (*ibid.*). As we argued in our opening brief (pp. 57-59), such a distinction is untenable (see also slip op. 6-9, concurring opinion of Judge Robinson).

replacing *Barr* with a qualified immunity, hundreds if not thousands of other actions in the public interest may be deferred or omitted" (slip op. 11).[7]

CONCLUSION

For the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the court of appeals, insofar as it reversed the dismissal of the complaint against petitioners, should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

[7]Respondent urges (Br. 10, 24, 54) that the judgment of the court of appeals should be reversed insofar as it affirmed the district court's dismissal of the suit against the Department of Agriculture and the Commodity Exchange Administration as barred by sovereign immunity. See the Statement in our opening brief, p. 9. But since (1) respondent did not file a cross-petition on this issue, and (2) the argument is not made as an alternative ground for affirmance of the judgment, the claim is not properly before the Court. Cf. *United States* v. *American Railway Express Company*, 265 U.S. 425, 435; *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226, n. 2